

11 U.S.C. § 1330(a)
Confirmation
Revocation

Educational Credit Management Corp. v. Robinson Adv. 01-6170-aer
In Re Robinson Bankruptcy # 600-65901-aer13

10/29/02

Radcliffe

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The Order confirming Debtor/Defendant's Chapter 13 plan contained an amendment providing for discharge of her student loan debt upon plan completion, based on undue hardship under § 523(a)(8). The confirmation order gave the student loan creditor 15 days to object and was served on the creditor's registered agent.

Plaintiff, the servicer for the ultimate guarantor on the loans, filed suit to revoke the confirmation order based on excusable neglect, mistake or other "cause" as set out in FRCP 60(b). Debtor argued § 1330(a) did not permit those grounds to revoke.

The court analyzed the statutory language. It recognized the majority and dissenting opinions in Branchburg Plaza Associates v. Fesq(*In re Fesq*), 153 F.3d 113 (3rd Cir. 1998) as the leading exposition of the issue, and sided with the majority, holding § 1330(a)'s specific reference to "fraud", precluded the grounds asserted by Plaintiff. This holding was consistent with the policy of finality normally accorded confirmation orders as expressed in § 1327(a). The court also recognized that "lack of due process" and the court's ability to correct its own mistakes, may, in appropriate cases, be additional grounds to revoke confirmation.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	600-65901-aer13
TERESA A. ROBINSON,)	
)	
Debtor.)	
EDUCATIONAL CREDIT MANAGEMENT)	Adversary Proceeding
CORPORATION,)	No. 01-6170-aer
)	
Plaintiff,)	
)	
v.)	
)	
TERESA A. ROBINSON,)	MEMORANDUM OPINION
)	
Defendant.)	

This adversary proceeding was brought by the plaintiff to
revoke an order, entered in the main bankruptcy case on January 5,
2001, confirming the debtor's Chapter 13 plan dated October 5, 2000
with certain modifications contained in the order. A trial has been
held and this court took the matter under advisement. This opinion
constitutes the court's findings of fact and conclusions of law,
they shall not be separately stated.

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1 accordingly in the confirmation order and to give Sallie Mae 15 days
2 to object. With that change, the trustee recommended confirmation.
3 This court confirmed the plan, but required that Sallie Mae be
4 specifically served with the Order confirming Plan pursuant to
5 Bankruptcy Rule 7004.

6 Meanwhile, OSAC assigned the loans to Plaintiff pursuant to a
7 transfer agreement. Plaintiff is the servicer for the ultimate
8 guarantor/reinsurer, the U. S. Department of Education. On January
9 2, 2001, Plaintiff received the transfer of the loans from OSAC via
10 magnetic tape. On January 5, 2001, OSAC transferred the loans to
11 Plaintiff by letter.

12 The Confirmation Order was entered on January 5, 2001.
13 Paragraph 12 of the Confirmation Order gave Sallie Mae 15 days to
14 object and notes the name of Sallie Mae's registered agent. The
15 Order was served by the court's clerk on Sallie Mae's registered
16 agent that same day.

17 On January 16, 2001, Plaintiff filed a Notice of Assignment of
18 Claim, attaching a computer copy of the January 5, 2001 OSAC
19 assignment. The Notice indicated the claim amount as \$53,293.07.
20 Plaintiff was then added to the mailing matrix. At no prior time
21 did Plaintiff advise the court that it held the claim. On February
22 12, 2001, Plaintiff received a copy of the original plan and
23 Confirmation Order from OSAC.

24 On March 1, 2001, debtor filed an amended plan which
25 contained identical student loan language. Plaintiff objected to
26 confirmation of the amended plan. Debtor withdrew the amended plan,

1 leaving the plan which had already been confirmed by the order of
2 January 5, 2001 in effect. On July 3, 2001, Plaintiff commenced
3 this adversary proceeding.

4 At trial, Plaintiff's only witness, Daniel Fisher, testified
5 in general about Plaintiff's and its predecessors' procedures. He
6 testified that upon the filing of a Chapter 13 petition, Sallie Mae
7 has an obligation to file a claim on the guaranty with OSAC within
8 30 days. OSAC then has 45 days to pay on the guaranty. Only after
9 it has paid, can it transfer the claim to Plaintiff. He further
10 testified that Plaintiff receives between 1,200-1,600 plan documents
11 per month, which are routed to its bankruptcy department. The
12 bankruptcy department is not on the lookout for discharge
13 provisions, such as the one contained here. Catching them is hit or
14 miss. The department is mainly concerned with ensuring that a proof
15 of claim has been filed. Plaintiff does not normally object to
16 confirmation, because the loans are presumptively nondischargeable.
17 On the other hand, if an adversary proceeding is filed, Sallie Mae
18 faxes the summons, which is routed directly to Plaintiff's legal
19 department, which then transfers the matter to outside counsel
20 within 48 hours. Sallie Mae does not, however, normally fax plan
21 documents to Plaintiff. Mr. Fisher admitted that since 1998 there
22 have been approximately 260-270 Chapter 13 plans with discharge
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1 provisions. He acknowledged the import of the 10th Circuit's
2 decision in In Re Anderson.¹

3 Plaintiff acknowledges that revocation of the order
4 confirming Debtor's Chapter 13 plan is not based on fraud or lack of
5 due process. Accordingly, Debtor maintains that the order
6 confirming the plan is immune from revocation based on
7 11 U.S.C. § 1330(a). Plaintiff maintains that the order confirming
8 the plan may be revoked for "misconduct" or "excusable neglect"
9 pursuant to FRCP 60 as made applicable to bankruptcy proceedings by
10 FRBP 9024.

11 ISSUE

12 This opinion discusses the question of whether or not the
13 Order Confirming the Chapter 13 plan may, in this case, be revoked
14 even though confirmation was not procured by fraud and the plaintiff
15 has not alleged a lack of due process. For the reasons that follow,
16 this court concludes that the order may not be revoked.

17 DISCUSSION

18 Unless otherwise indicated, all statutory references are to
19 the Bankruptcy Code, Title 11, United States Code.

20 Section 1330(a) provides:

21 On request of a party in interest at any time within
22 180 days after the date of the entry of an order of
23 confirmation under section 1325 of this title, and
after notice and a hearing, the court may revoke such
order if such order was procured by fraud.

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25 ¹In Anderson v. Unipac-Nebhelp, (*In re Anderson*), 179 F.3d 1253 (10th Cir.
26 1999) the court upheld, on res judicata grounds, a discharge clause in a plan
against a collateral attack, while acknowledging that the clause did not comply
with the Code. Plaintiff was the student loan creditor there, as here.

1 Plaintiff argues that FRCP 60(b) - as applicable through FRBP
2 9024² - provides additional grounds for revocation of a Chapter 13
3 confirmation order. More particularly, Plaintiff argues § 1330(a)
4 should be construed as a mere limitations period on revocation,
5 where the action is based on fraud. In contrast, Defendant argues
6 that § 1330(a) is both a substantive and temporal limitation on
7 revocation.

8 Both sides of the issue before this court were eloquently
9 discussed in Branchburg Plaza Associates, L.P. v. Fesq, (*In re*

12 ² FRBP 9024 provides in pertinent part:

13 Rule 60 F.R. Civ. P. applies in cases under the Code except that ...

14 (3) a complaint to revoke an order confirming
15 a plan may be filed only within the time
16 allowed by § 1144, § 1230, or § 1330.

17 FRCP 60(b) in turn provides in pertinent part:

18 [T]he court may relieve a party ... from a final
19 judgment, order or proceeding for the following reasons:
20 (1) mistake, inadvertence, surprise, or excusable
21 neglect; (2) newly discovered evidence which by due
22 diligence could not have been discovered in time to move
23 for a new trial under Rule 59(b); (3) fraud (whether
24 heretofore denominated intrinsic or extrinsic),
25 misrepresentation, or other misconduct of an adverse
26 party; (4) the judgment is void; (5) the judgment has
been satisfied, released, or discharged, or a prior
judgment upon which it is based has been reversed or
otherwise vacated, or it is no longer equitable that the
judgment should have any prospective application; or (6)
any other reason justifying relief from the operation of
the judgment. The motion shall be made within a
reasonable time, and for reasons (1), (2), and (3) not
more than one year after the judgment, order, or
proceeding was entered or taken.

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1 *Fesq*), 153 F.3d 113 (3rd Cir. 1998) where the majority adopted the
2 defendant's position, the dissent, the plaintiff's.

3 In *Fesq*, a secured creditor moved to revoke a confirmation
4 order based on inadvertence, excusable neglect or mistake.
5 Creditor's counsel alleged he missed the date for filing objections
6 to confirmation due to a computer glitch at his office. In
7 rejecting the argument that § 1330(a) is merely a limitations
8 period, the court held § 1330 provided the complete substantive
9 basis for revocation of confirmation orders. It gave effect to FRBP
10 9024 by limiting it to the Rule 60 grounds based on fraud, and in
11 any case, if the statute and rule conflicted, the rule must give way
12 pursuant to 28 USC § 2075.³

13 The majority reached its conclusion by the following
14 reasoning:

15 It is of course conventional wisdom that the
16 statute should be read to give some effect to the
17 final phrase "if such order was procured by fraud,"
18 for as a general rule of statutory construction "[w]e
19 strive to avoid a result that would render statutory
20 language superfluous, meaningless, or irrelevant". . . .
21 And here it is particularly unlikely that the final
22 phrase is mere surplusage, because it would have been
23 so easy not to include the phrase if it were really
24 superfluous. Simply excising the phrase from the
25 statute would have left a perfectly sensible sentence
26 that would accomplish every purpose of the current
statute-except, that is, for limiting the grounds for
relief, the subject that we address hereafter.

Ordinary English usage tells us that Section
1330(a) is subject to only two interpretations if we
are to avoid rendering meaningless the qualification
"if such order was procured by fraud." First, the

³ 28 USC § 2075 provides in pertinent part that the bankruptcy rules
"shall not abridge, enlarge, or modify any substantive right." (emphasis added).

1 section can be read to say that a confirmation order
2 can be revoked only upon a showing of fraud, and to
3 set a 180-day time frame within which a motion for
4 such relief may be tendered. Second, the section can
5 be read as only prescribing a 180-day time limit on
6 motions to revoke orders that were procured by fraud,
without speaking at all to the subject of other
potential grounds for revocation. . . . [W]e conclude
that the first construction is the more reasonable
interpretation of Congress' intent. (Internal
citations omitted).

7 Id. at 115.

8 As to the second possible interpretation, the majority stated
9 that they could find no reason why:

10 Congress would find it necessary to reassure courts
11 that fraud-among all of the grounds for relief
12 enumerated in Rule 60(b)-is a permissible reason to
13 revoke a confirmation order. Surely if any
14 confirmation of the circumstances entitling a litigant
15 to relief were needed, actual fraud on the litigant
would be the least likely candidate for such a
statutory confirmation. Thus on its face the Section
1330(a) language makes far more sense as a substantive
limitation than as a needless permissive reminder.

16 Id. at 117. In addition, the majority notes that the first
17 interpretation of the statute protects the finality of Chapter 13
18 confirmation orders. Id. at 119.

19 The dissent in Fesq, Id. at 120 (Stapleton, J. dissenting),
20 argues that the second interpretation noted by the majority is the
21 proper one. It reasoned:

22 As I read it, and as the drafters of Rule 9024 must
23 have read it, section 1330(a) says nothing about
24 limiting the grounds on which relief from a
confirmation order may be granted.

25 Id. at 121.

1 Rule 9024 thus incorporates the grounds of relief
2 provided in Rule 60 and then provides a different time
3 schedule with respect to three separate categories of
4 orders. The time limit for application for relief
5 from an order confirming a plan of reorganization is
6 the 180 days specified in the three cited statutory
7 sections.

8 Id.

9 The court logically observes that any court would
10 know that it had the power to revoke a confirmation
11 order procured by fraud without statutory
12 confirmation, and that section 1330(a) must therefore
13 be read as a substantive limitation on the available
14 grounds for relief. But the function of section 1330
15 is not to reassure courts that they have the power to
16 revoke confirmation plans for fraud. Rather, its
17 function is to provide a check by Congress on a
18 court's natural inclination to entertain charges of
19 actual fraud at any time-such challenges may only be
20 brought within 180 days. This time limitation is the
21 essence of section 1330(a), and Rule 9024 incorporates
22 this essential element. Section 1330(a) contains no
23 restriction on the court's ability to consider any
24 number of bases for revisiting a confirmed plan, and
25 Rule 9024 incorporates the only true restriction in
26 that section. Rule 9024 in no way runs afoul of
section 1330(a).

Id.

The dissent also observed § 1144, the parallel Chapter 11
provision, was amended in 1984 to add the language "if and only"
before "if such order was procured by fraud", while § 1330((a) went
unchanged. It deduced Congress had a reason for making the change,
perhaps to make Chapter 11 plans more difficult to set aside. The
majority, however, saw this change as merely technical - perhaps to
address then recent case law holding fraud was a nonexclusive ground
for revocation of Chapter 11 confirmation orders. Id. at 118. The
dissent also hints that the 9th Circuit might not follow the

majority decision, citing Cisneros v. U.S. (*In re Cisneros*), 994 F.2d 1462 (9th Cir. 1993).

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In Cisneros, supra, the trustee mistakenly reported that all claims had been paid through a Chapter 13 plan. Based on that report, the bankruptcy court entered a discharge under § 1328(a). In fact, the IRS' allowed claim had not been paid. The IRS sought to revoke the discharge order. The bankruptcy court framed the issue as to whether the discharge could be revoked based on "mistake". The 9th Circuit Court of Appeals held that FRBP 9024 could co-exist with § 1328(e)⁴ (which allows revocation of a Chapter 13 discharge "only if" for fraud), at least to correct a mistake of fact by the court. The court noted that there is "no reason to believe that Congress intended section 1328(e) to prevent the bankruptcy court from correcting its own mistakes." Id. at 1466.

The order of discharge was entered by the bankruptcy court under misapprehension as to the facts of the case. Had the court been apprised of the actual facts, it would never have entered the order. In our view, this is precisely the sort of "mistake" or "inadvertence" that Rule 60(b) was intended to reach.

Id. at 1467.

⁴ Section 1328(e) provides:

On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if-

- (1) such discharge was obtained by the debtor through fraud; and
- (2) the requesting party did not know of such fraud until after such discharge was granted.

1 In a subsequent case, Judge Perris, of this Court, has opined
2 in the § 727(d)(1)⁵ and § 727(e)⁶, context, that Cisneros is a
3 reaffirmation of a court's inherent power to correct its own
4 mistakes. In Re Ford, 159 B.R. 590, 593 (Bankr. D. Or. 1993). She
5 disagreed that Cisneros should be read as a broad power to use FRCP
6 60(b) to vacate discharges (under § 727(d)). Id.; see also, In Re
7 Daniels, 163 B.R. 893 (Bankr. S.D. Ga. 1994) (similarly limiting
8 Cisneros in the context of § 1328(e)).

9 Here, the confirmation of Debtor's Chapter 13 plan cannot be
10 revoked based upon a mistake of fact, such as existed in Cisneros,
11 as the true state of the facts was placed upon the record in open
12 court, and the court confirmed the debtor's plan after being
13 satisfied that Plaintiff (or at least Plaintiff's predecessor in
14 interest) would be specifically served with the order of
15 confirmation and given an opportunity to object.

19 ⁵ Section 727(d)(1) allows for revocation of a Chapter 7 discharge if "such
20 discharge was obtained through the fraud of the debtor, and the requesting party
21 did not know of such fraud until after the granting of such discharge."

22 ⁶ Section 727(e) provides:

23 The trustee, a creditor, or the United States trustee may request a
24 revocation of a discharge -

24 (1) under subsection (d)(1) of this section within one
25 year after such discharge is granted; or
26 (2) under subsection (d)(2) or (d)(3) of this section
before the later of-

(A) one year after the granting of such
discharge; and

(B) the date the case is closed.

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Conclusion

After due consideration, this Court agrees with both the Fesq majority, and Ford's interpretation of Cisneros. In the final analysis, § 1330(a)⁷ must be construed as Congress' acknowledgment that confirmation orders are indeed different than other orders. "Any other result does harm to the finality normally accorded confirmation orders and specifically provided for by Congress in § 1327(a)." In Re Ritacco, 210 B.R. 595, 599 (Bankr. D. Or. 1997).

It is noteworthy that plaintiff has not alleged any lack of due process in this case. Any failure to receive timely notice of the Chapter 13 plan or the Order confirming the Chapter 13 plan by the plaintiff was occasioned by the convoluted assignment process described in the factual background of this opinion. The plaintiff was admonished in Anderson v. Unipac-Nebhelp, (*In re Anderson*), 179 F.3d 1253 (10th Cir. 1999) that: "A creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests." Id. at 1257. Accordingly, based solely upon the facts in this case, Plaintiff's complaint must fail. An appropriate judgment shall be entered dismissing the plaintiff's complaint and awarding to the debtor/defendant her costs and disbursements incurred herein.

ALBERT E. RADCLIFFE
Chief Bankruptcy Judge

⁷ Along with §§ 1144 & 1230(a).
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